

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 4351

To amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund) to provide a mechanism for the allocation of liability among potentially responsible parties, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1994

Mr. BOUCHER (for himself, Mr. UPTON, and Ms. LAMBERT) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and Public Works and Transportation

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## A BILL

To amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund) to provide a mechanism for the allocation of liability among potentially responsible parties, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Superfund Liability  
5       Allocation Act of 1994”.

1 **SEC. 2. ALLOCATION PROCEDURES.**

2 The Comprehensive Environmental Response, Com-  
3 pensation and Liability Act of 1980 (Superfund) is  
4 amended by inserting after section 126 the following new  
5 section:

6 **“SEC. 127. ALLOCATION AT MULTIPARTY FACILITIES.**

7 “(a) SCOPE.—

8 “(1) POST-INTRODUCTION RODS.—For each  
9 non-federally owned facility listed on the National  
10 Priorities List involving 2 or more potentially re-  
11 sponsible parties for which the President selects a  
12 remedial action on or after February 3, 1994, the  
13 Administrator shall initiate the allocation process  
14 under this section. This paragraph shall not apply to  
15 response actions selected prior to such date.

16 “(2) PRE-INTRODUCTION RODS.—For each non-  
17 federally owned facility listed on the National Prior-  
18 ities List involving 2 or more potentially responsible  
19 parties, for any remedial action selected by the  
20 President before February 3, 1994, the Adminis-  
21 trator shall initiate the allocation process under this  
22 section, if requested to do so by a potentially respon-  
23 sible party which has resolved its liability to the  
24 United States with respect to the remedial action or  
25 which is performing the remedial action pursuant to  
26 an order issued under section 106(a).

1           “(3) OTHER FACILITIES.—The Administrator,  
2           as the Administrator deems appropriate, may initi-  
3           ate the allocation process under this section for any  
4           facility other than a facility referred to in paragraph  
5           (1) or (2) involving 2 or more potentially responsible  
6           parties.

7           “(4) EXCLUDED FACILITIES.—The allocation  
8           process under this section shall not apply to any of  
9           the following:

10               “(A) A facility for which there has been a  
11               final settlement, decree, or order that deter-  
12               mines all liability or allocated shares of all po-  
13               tentially responsible parties.

14               “(B) A facility for which the response ac-  
15               tion is being carried out by a State pursuant to  
16               the authority of this Act.

17               “(C) A facility at which all of the poten-  
18               tially responsible parties are facility owners or  
19               operators.

20           “(5) MULTIPLE REMEDIAL ACTIONS.—An allo-  
21           cation under this section, shall apply to all remedial  
22           actions selected by the President for a facility on or  
23           after February 3, 1994 (but not to those remedial  
24           actions described in paragraph (2)), unless the allo-

1 cator determines that the allocation should address  
2 only one or more of such remedial actions.

3 “(6) MULTIPLE FACILITIES.—An allocation  
4 under this section may address more than 1 facility  
5 where appropriate. Where appropriate, the Adminis-  
6 trator may combine allocations performed pursuant  
7 to this subsection for separate remedial actions at  
8 the same facility, or for different facilities.

9 “(7) EFFECT OF ALLOCATION.—An allocation  
10 performed pursuant to paragraph (2) or (3) of this  
11 section shall not be construed to require—

12 “(A) payment of an orphan share pursuant  
13 to this section; or

14 “(B) the conferral of reimbursement rights  
15 pursuant to this section.

16 “(8) SETTLEMENT OFFERS AFTER COMMENCE-  
17 MENT OF LITIGATION.—The provisions of this sec-  
18 tion shall not apply to any offer of settlement made  
19 after expiration of the moratorium period under sub-  
20 section (b).

21 “(b) MORATORIUM ON COMMENCEMENT OR CON-  
22 TINUATION OF SUITS.—

23 “(1) MORATORIUM ON COMMENCEMENT.—No  
24 person may assert any claim pursuant to section 107  
25 of this Act or commence any civil action seeking re-

1 recovery of any response costs in connection with a re-  
2 sponse action for which an allocation is required  
3 under subsection (a)(1) or (2), or for which the Ad-  
4 ministrator has initiated an allocation under sub-  
5 section (a)(3), until 90 days after issuance of the  
6 allocator's report under subsections (h) or (m),  
7 whichever is later.

8 “(2) STAY OF EXISTING ACTIONS.—If a claim  
9 under section 107 of this Act or an action seeking  
10 recovery of response costs in connection with a re-  
11 sponse action for which an allocation is to be per-  
12 formed under this section is pending—

13 “(A) upon the date of enactment of the  
14 Superfund Reform Act of 1994, or

15 “(B) upon initiation of an allocation,  
16 the action or claim shall be stayed until 90 days  
17 after the issuance of the allocator's report, unless  
18 the court determines that a stay will result in mani-  
19 fest injustice.

20 “(3) STATUTE OF LIMITATIONS.—Any applica-  
21 ble limitations period with respect to a cause of ac-  
22 tion subject to paragraph (1) shall be tolled from the  
23 earlier of the following until 180 days after the allo-  
24 cation report required by this section has been is-  
25 sued by the allocator:

1           “(A) The date of listing of the facility on  
2           the National Priorities List.

3           “(B) The commencement of the allocation  
4           process pursuant to this section.

5           “(c) COMMENCEMENT OF ALLOCATION.—

6           “(1) RESPONSIBLE PARTY SEARCH.—At all fa-  
7           cilities subject to this section, the Administrator  
8           shall, as soon as practicable, but not later than 60  
9           days after the commencement of the remedial inves-  
10          tigation, initiate a thorough investigation and search  
11          for all potentially responsible parties, using his au-  
12          thorities under section 104. Any person may submit  
13          information to the Administrator concerning any po-  
14          tentially responsible party at the facility, and the  
15          Administrator shall consider such information in  
16          carrying out the responsible party search.

17          “(2) NOTIFICATION OF DE MINIMIS PARTIES.—  
18          As soon as practicable after receipt of sufficient in-  
19          formation, but not more than 12 months after the  
20          commencement of the remedial investigation, the  
21          Administrator shall take each of the following  
22          actions:

23                 “(A) The Administrator shall notify any  
24                 potentially responsible party who the Adminis-  
25                 trator determines is eligible for an expedited

1 final settlement in accordance with section  
2 122(g)(1)(A) of its eligibility, based on informa-  
3 tion available to the Administrator at the time  
4 the determination is made.

5 “(B) The Administrator shall submit a  
6 written settlement offer to each party notified  
7 under subparagraph (A) no later than 60 days  
8 after such notification.

9 “(3) PRELIMINARY NOTICE TO OTHER PAR-  
10 TIES.—As soon as practicable after receipt of suffi-  
11 cient information, but not later than 18 months  
12 after commencement of the remedial investigation,  
13 the Administrator shall—

14 “(A) notify any party not previously noti-  
15 fied under paragraph (2) who the Adminis-  
16 trator determines is eligible for an expedited  
17 final settlement in accordance with section  
18 122(g)(1)(A) of its eligibility, based on informa-  
19 tion available to the Administrator at the time  
20 the determination is made and submit a written  
21 settlement offer to each party notified pursuant  
22 to this subparagraph no later than 60 days  
23 after such notification;

1           “(B) issue a list of all potentially respon-  
2           sible parties preliminarily identified by the Ad-  
3           ministrator to all such parties;

4           “(C) notify the public, in accordance with  
5           section 117(d), of the list of potentially respon-  
6           sible parties identified pursuant to subpara-  
7           graphs (A) and (B) by the Administrator; and

8           “(D) make available all responses to infor-  
9           mation requests, as well as other relevant infor-  
10          mation concerning the facility and potentially  
11          responsible parties, to the notified parties, to  
12          the extent it is available to the Administrator.  
13          The Administrator shall not make available any  
14          privileged or confidential information, except as  
15          otherwise authorized by law.

16          The Administrator shall take the actions specified in  
17          this paragraph within 9 months after the date of en-  
18          actment of this section for all facilities eligible for  
19          allocation under subsection (a)(1) or (a)(2) for  
20          which the responsible party search required by a  
21          paragraph (1) was substantially complete prior to  
22          the date of the enactment of this section.

23          “(4) STATUS OF PARTIES.—At the time of pro-  
24          posing the list of potentially responsible parties  
25          under paragraph (3), the Administrator shall—

1           “(A) identify parties that are eligible for  
2           expedited settlement pursuant to section  
3           122(g);

4           “(B) identify parties who are not eligible  
5           for such expedited settlement; or

6           “(C) determine that there is insufficient  
7           information to ascertain whether or not the  
8           party is entitled to such expedited settlement.

9           “(5) NOMINATION OF PARTIES.—(A) For 60  
10          days after information has been made available pur-  
11          suant to paragraph (3), the parties identified by the  
12          Administrator and members of the affected commu-  
13          nity shall have the opportunity to identify and nomi-  
14          nate additional potentially responsible parties or oth-  
15          erwise provide information relevant to the facility or  
16          such potentially responsible parties. This period may  
17          be extended by the Administrator for an additional  
18          30 days upon request of any person.

19          “(B) Any proposal for the addition of any po-  
20          tentially responsible party shall be supported by full  
21          disclosure to the Administrator of all available infor-  
22          mation concerning that party’s liability and con-  
23          tribution of hazardous substances to the site.

24          “(6) LIST OF ALLOCATION PARTIES.—(A)  
25          Within 60 days after the end of the period specified

1 in paragraph (5)(A) for the proposed additional parties,  
2 the Administrator shall—

3 “(i) issue a list of parties subject to the allocation  
4 process (hereinafter referred to in this  
5 section as the ‘allocation parties’);

6 “(ii) identify in writing, as to each of the  
7 proposed additional parties, which parties the  
8 Administrator has determined, in the Administrator’s  
9 sole discretion:

10 “(I) to be eligible for expedited settlement  
11 pursuant to section 122(g),

12 “(II) not to be eligible for such expedited  
13 settlement, and

14 “(III) for whom insufficient information  
15 exists to determine whether or not the  
16 party is eligible for such expedited settlement;  
17 and

18 “(iii) identify (in writing supported by  
19 brief explanation) those parties as to which the  
20 Administrator has determined, in the Administrator’s  
21 sole discretion, that there is an inadequate  
22 basis in law or fact to determine that  
23 the party is potentially liable.

24 For each party identified under clause (iii), the Administrator  
25 shall further identify whether that party

1 if liable, would be eligible for an expedited settle-  
2 ment.

3 “(B) At the time of issuance of the list of par-  
4 ties provided for in subparagraph (A), the Adminis-  
5 trator shall provide the potentially responsible par-  
6 ties who received notice under this paragraph with  
7 a list of neutral parties who are not employees of the  
8 United States and who the Administrator deter-  
9 mines, in the Administrator’s sole discretion, are  
10 qualified to perform an allocation at the facility.

11 “(C) De minimis parties the Administrator  
12 identifies as potentially liable but entitled to expe-  
13 dited settlement pursuant to this section, shall not  
14 be subject to, or assigned a share in, the allocation  
15 (except to the extent required to determine the or-  
16 phan share pursuant to subsection (h)), unless that  
17 party fails to reach an agreement with the President  
18 on settlement terms within 30 days after the offer.

19 “(D) If the Administrator determines that there  
20 is an inadequate basis in law or fact to conclude that  
21 a party is liable based on the information presented  
22 by the nominating party or otherwise available to  
23 the Administrator, and if the Administrator has de-  
24 termined the party to be eligible for an expedited  
25 settlement, the party shall not be subject to, and

1 shall not be assigned a share in, the allocation. With  
2 respect to all other parties, the Administrator's de-  
3 termination shall be accorded deference by the allo-  
4 cator. For such parties the allocator shall consider  
5 the Administrator's determination together with the  
6 allocation factors listed in subsection (h)(2).

7       “(E) The Administrator's determinations for  
8 purposes of this subsection shall not be subject to  
9 judicial review, nor shall any determination or expla-  
10 nation provided for purposes of the allocation be ad-  
11 missible for any purpose in an action commenced by  
12 the United States against the party that is the sub-  
13 ject of the determination or any other party.

14       “(F) The allocator may assign a zero share to  
15 any party the allocator deems should receive such a  
16 share in consideration of the allocation factors in-  
17 cluding the Administrator's determinations under  
18 subparagraph (C).

19       “(G) If a party is included in the allocation  
20 pursuant to the nomination of a potentially respon-  
21 sible party pursuant to subsection (c)(5), but as-  
22 signed a zero share by the allocator, that party's  
23 costs of participating in the allocation (including  
24 reasonable attorneys' fees) shall be borne by the

1 party who proposed the addition of the party to the  
2 allocation.

3 “(d) DE MINIMIS SETTLEMENT OFFER.—(1) Within  
4 30 days after the final list of parties is issued pursuant  
5 to paragraph (6) of subsection (c), the Administrator shall  
6 submit a written settlement offer to any party identified  
7 as a potentially responsible party pursuant to this section  
8 who the Administrator has determined to be eligible for  
9 an expedited final settlement in accordance with section  
10 122(g)(1)(A), and who has not entered into a settlement  
11 with the United States regarding the matters being ad-  
12 dressed by the allocation.

13 “(2) The President shall not include any premia pur-  
14 suant to section 122(g) in a settlement offer made pursu-  
15 ant to paragraph (1) more than 60 days after the date  
16 the offer is required to be made pursuant to paragraph  
17 (1) to a party that is a small business.

18 “(e) SELECTION OF ALLOCATOR.—

19 “(1) PROPOSAL OF ADDITIONAL CAN-  
20 DIDATES.—Any party identified by the Adminis-  
21 trator under subsection (c) may propose any person  
22 whom such party deems qualified for selection as an  
23 allocator in addition to those proposed from the list  
24 provided under subsection (c)(6)(B).

1           “(2) SELECTION OF ALLOCATOR BY ALLOCA-  
2           TION PARTIES.—(A) The allocation parties shall se-  
3           lect an allocator from the list of allocators proposed  
4           by the Administrator or under paragraph (1) by the  
5           following voting method with each allocation party  
6           having a single vote:

7                   “(i) Each allocation party and the Admin-  
8                   istrator voting for the identified but insolvent or  
9                   defunct parties shall numerically rank the indi-  
10                  viduals on the final list of proposed allocators,  
11                  with a ranking of 1 indicating first preference,  
12                  and forward its vote to the Administrator with-  
13                  in 30 days of the issuance of the final list of  
14                  allocators pursuant to subsection (c)(6)(B).

15                  “(ii) The proposed allocator who receives  
16                  the lowest combined numerical score, taking  
17                  into account all votes submitted to the Adminis-  
18                  trator pursuant to subparagraph (i), and who  
19                  agrees to serve as allocator, shall be determined  
20                  to be the allocator.

21           The Administrator may cast the votes of identified  
22           but insolvent or defunct parties.

23           “(3) PEREMPTORY STRIKE.—The Adminis-  
24           trator may reject any allocator selected by the allo-  
25           cation parties if the proposed allocator is not on the

1 list provided under paragraph (3)(D) of subsection  
2 (c). In the case of any such rejection, the allocation  
3 parties shall select the allocator in order of numeri-  
4 cal ranking in accordance with this subsection.

5 “(4) SELECTION OF ALLOCATOR BY EPA.—If  
6 the allocation parties do not select an allocator pur-  
7 suant to paragraph (3) within 30 days after receipt  
8 of the list provided under paragraph (2), the Admin-  
9 istrator shall select the allocator.

10 “(f) CONTRACT.—Following selection of the allocator,  
11 the Administrator shall enter into a contract with the se-  
12 lected allocator for the provision of allocation services, and  
13 immediately make available all responses to information  
14 requests, as well as other relevant information concerning  
15 the facility and potentially responsible parties, to the allo-  
16 cator. The Administrator has the authority to use the pro-  
17 curement procedures set forth in section 109(e) to procure  
18 the services of a neutral professional for use in conducting  
19 allocation procedures under this section, whether or not  
20 the neutral professional actually conducts such allocation  
21 procedures.

22 “(g) POTENTIALLY RESPONSIBLE PARTY SETTLE-  
23 MENT.—At any time prior to the issuance of an allocation  
24 report as described in subsection (h), any group of poten-  
25 tially responsible parties may submit to the allocator a pri-

1 vate allocation for the remedial action or operable unit.  
2 If such private allocation meets all of the following cri-  
3 teria, the allocator shall promptly adopt it as the allocation  
4 report:

5 “(1) The private allocation is a binding alloca-  
6 tion of 100 percent of the past, present, and future  
7 recoverable costs of the remedial action or operable  
8 unit.

9 “(2) The private allocation does not allocate  
10 any share of response costs to any person who is not  
11 a signatory to the proposed private allocation or, in  
12 the case of any orphan share, unless the United  
13 States is a signatory to the proposed private alloca-  
14 tion.

15 “(3) The signatories to the proposed private al-  
16 location waive their contribution rights with respect  
17 to the remedial action or operable unit thereof  
18 against all other potentially responsible parties at  
19 the facility.

20 “(h) ALLOCATION DETERMINATION.—

21 “(1) SETTLEMENT AND ALLOCATION RE-  
22 PORT.—Following issuance of the final list of alloca-  
23 tion parties pursuant to subsection (c)(6)(A)(i), the  
24 allocator shall initiate and conduct an allocation  
25 process that shall culminate in the issuance of a

1 written report, with a nonbinding, equitable allocation of the percentage shares of responsibility of all allocation parties, including the orphan share, for the facility, and provide such report to the allocation parties and the Administrator. The allocator shall provide the report to the allocation parties and the Administrator within 180 days of the issuance of the list of parties pursuant to subsection (c)(6) or the date of the contract for allocation service pursuant to subsection (f), whichever is later. Upon request, for good cause shown, the Administrator may grant the allocator additional time to complete the allocation, not to exceed 90 days.

14 “(2) FACTORS IN THE ALLOCATION.—The allocator shall prepare a nonbinding, equitable allocation of percentage shares for the facility based on the following factors:

18 “(A) The amount of hazardous substances contributed by each allocation party.

20 “(B) The degree of toxicity of hazardous substances contributed by each allocation party.

22 “(C) The mobility of hazardous substances contributed by each allocation party.

24 “(D) The degree of involvement of each allocation party in the generation, transportation,

1 treatment, storage, or disposal of the hazardous  
2 substance.

3 “(E) The degree of care exercised by each  
4 allocation party with respect to the hazardous  
5 substance, taking into account the characteris-  
6 tics of the hazardous substance.

7 “(F) The cooperation of each allocation  
8 party in contributing to the response action and  
9 in providing complete and timely information  
10 during the allocation process.

11 “(G) Such other factors that the Adminis-  
12 trator determines are appropriate by published  
13 guidance. Any such guidance shall be consistent  
14 with this Act and shall be published only after  
15 notice and opportunity for public comment.

16 “(3) CONDUCT OF ALLOCATION PROCESS.—The  
17 allocator shall conduct the allocation process and  
18 render a decision based solely on the provisions of  
19 this section, including the allocation factors specified  
20 in paragraph (2). Each party to the allocation shall  
21 be afforded an opportunity to be heard (either orally  
22 or in writing, at the allocator’s discretion), and an  
23 opportunity to comment on a draft allocation report.  
24 The allocator shall not be required to respond to  
25 comments.

1 “(4) IDENTIFICATION OF ORPHAN SHARES.—

2 “(A) COMPONENTS OF ORPHAN SHARE.—

3 The allocator may determine that a percentage  
4 share for the facility is specifically attributable  
5 to an orphan share. The orphan share shall  
6 consist only of the following:

7 “(i) Shares attributable to hazardous  
8 substances that the allocator determines,  
9 on the basis of information presented, to  
10 be specifically attributable to identified but  
11 insolvent or defunct allocation parties who  
12 are not affiliated with any viable allocation  
13 party.

14 “(ii) The difference between the ag-  
15 gregate shares that the allocator deter-  
16 mines, on the basis of the information pre-  
17 sented, is specifically attributable to alloca-  
18 tion parties that are contributors of munic-  
19 ipal solid waste, and the share actually as-  
20 sumed by those parties in any settlements  
21 with the United States pursuant to sub-  
22 section 122(g), including the fair market  
23 value of in-kind services provided by a  
24 municipality.

1           “(iii) The difference between the ag-  
2           gregate share that the allocator deter-  
3           mines, on the basis of information pre-  
4           sented, to be specifically attributable to al-  
5           location parties with a limited ability to  
6           pay response costs and the share actually  
7           assumed by those parties in any settle-  
8           ments with the United States pursuant to  
9           subsection 122(g).

10           “(B) NOT INCLUDED IN ORPHAN SHARE.—  
11           Shares attributable to hazardous substances  
12           that the allocator cannot attribute to any iden-  
13           tified party shall be distributed among the allo-  
14           cation parties, including the orphan share.

15           “(i) ANSWERS AND CERTIFICATIONS TO  
16           ALLOCATOR’S INFORMATION REQUESTS.—

17           “(1) SUBPOENAS AND INFORMATION RE-  
18           QUESTS.—Where necessary to assist in determining  
19           the allocation of shares, the allocator may request  
20           information or documents from any allocation party  
21           in accordance with paragraph (2) or (5) of section  
22           104(e), and require by subpoena the attendance of  
23           persons or the production of documents, or other in-  
24           formation in accordance with section 104(e)(7). Any  
25           allocation party to whom a request is directed shall

1 include in the response a certification by a respon-  
2 sible representative or authorized representative that  
3 satisfies the requirement of section 104(e)(3). The  
4 allocator may also request the Administrator to uti-  
5 lize the authorities of paragraph (2) and to exercise  
6 any information-gathering authority of the Adminis-  
7 trator under this Act.

8 “(2) POWERS OF THE ALLOCATOR.—In addi-  
9 tion to the information-gathering authority set forth  
10 in paragraph (1), the allocator shall have the au-  
11 thority to schedule meetings and require the attend-  
12 ance of allocation parties at such meetings; to re-  
13 quire that allocation parties wishing to present simi-  
14 lar legal or factual positions consolidate their pres-  
15 entations; to obtain or employ support services, in-  
16 cluding secretarial and clerical services, computer  
17 support services, and legal and investigative services;  
18 and to take any other actions necessary to conduct  
19 a fair, efficient, and impartial allocation process.

20 “(j) CIVIL AND CRIMINAL PENALTIES.—

21 “(1) CIVIL PENALTIES.—Where the allocator is-  
22 sues an administrative subpoena or information re-  
23 quest pursuant to subsection (i), a party who unrea-  
24 sonably fails to comply with the subpoena or request

1 shall be subject to a civil penalty not to exceed  
2 \$25,000 for each day of noncompliance.

3 “(2) ENFORCEMENT.—The allocator may seek  
4 enforcement of an administrative subpoena or infor-  
5 mation request pursuant to subsection (i)(1), and  
6 shall seek such enforcement by requesting that the  
7 Attorney General commence an action to enforce the  
8 subpoena or request. The Attorney General, within  
9 30 days after receiving such request from the allo-  
10 cator, shall—

11 “(A) notify the allocator that the Attorney  
12 General will commence an action to enforce the  
13 subpoena or information request;

14 “(B) notify the allocator that the Attorney  
15 General will not seek enforcement of the sub-  
16 poena or request because the subpoena or re-  
17 quest is barred by law or would result in annoy-  
18 ance, embarrassment, oppression, or undue bur-  
19 den or expense to the party to whom it was  
20 issued;

21 “(C) notify the allocator that the Attorney  
22 General has insufficient information on which  
23 to determine whether an enforcement action is  
24 appropriate.

1           “(3) FAILURE OF ATTORNEY GENERAL TO RE-  
2       SPOND.—If the Attorney General fails to provide  
3       any response to the allocator within 30 days of a re-  
4       quest for enforcement of a subpoena or information  
5       request, the allocator may retain counsel to com-  
6       mence a civil action to enforce the subpoena or in-  
7       formation request.

8           “(4) PENALTY.—If the Attorney General or al-  
9       locator prevails in an action to enforce an allocator’s  
10      subpoena or information request, the party who  
11      failed to comply shall be subject to a sanction that  
12      may include civil penalties as provided in subpara-  
13      graph (B). The court shall require such party to pay  
14      the reasonable expenses, including attorney’s fees,  
15      caused by the failure to comply, unless the court  
16      finds that the failure was substantially justified or  
17      that other circumstances make an award of expenses  
18      unjust.

19          “(5) CRIMINAL.—Any person who knowingly  
20      makes any false material statement or representa-  
21      tion in the response to an allocator’s information re-  
22      quest or subpoena issued pursuant to subsection (i)  
23      shall be deemed to have made a false statement on  
24      a matter within the jurisdiction of the United States  
25      within the meaning of 18 U.S.C. 1001.

1 “(k) DOCUMENT REPOSITORY; CONFIDENTIALITY.—

2 “(1) DOCUMENT REPOSITORY.—The allocator  
3 shall establish and maintain a document repository  
4 containing copies of all documents and informa-  
5 tion—

6 “(A) provided by the Administrator pursu-  
7 ant to this section,

8 “(B) provided or generated by the alloca-  
9 tion parties, or

10 “(C) generated by the allocator during the  
11 allocation.

12 The documents and information in the document re-  
13 pository shall be available only to the parties to the  
14 allocation process for review and copying at their  
15 own expense, subject to the confidentiality provisions  
16 of paragraph (2). The Administrator shall provide to  
17 the allocator all information obtained under section  
18 104(e), including information entitled to protection  
19 under section 1905 of title 18, United States Code,  
20 or exempt from disclosure pursuant to section  
21 552(a) of title 5, United States Code. An allocation  
22 party shall not assert any privilege as a basis for  
23 withholding any information from the allocator.

24 “(2) CONFIDENTIALITY.—All documents and  
25 materials submitted to the allocator or placed in the

1 document repository, together with the record of any  
2 information generated or obtained during the alloca-  
3 tion process, shall be confidential. The allocator,  
4 each allocation party, the Administrator, and the At-  
5 torney General shall maintain such documents and  
6 materials, together with the record of any informa-  
7 tion generated or obtained during the allocation, as  
8 confidential and are prohibited from using any such  
9 material in any other matter or proceeding, and  
10 shall not be subject to disclosure under section 552  
11 of title 5. Such material shall not be discoverable or  
12 admissible in any other Federal, State, or local judi-  
13 cial, administrative, or legislative proceedings, ex-  
14 cept—

15 “(A) a new allocation pursuant to sub-  
16 sections (m) or (n) for the same remedial action  
17 or operable unit, or

18 “(B) an initial allocation for a different  
19 remedial action or operable unit at the same  
20 facility.

21 Nothing in this section shall be construed to author-  
22 ize any person, including the allocator, to withhold  
23 any documents or information from Congress, or any  
24 duly authorized Committee thereof, or limit in any  
25 manner the right of Congress, or any duly author-

1        ized Committee thereof, to obtain such documents or  
2        information.

3            “(3) DISCOVERABILITY AND ADMISSIBILITY.—  
4        Notwithstanding the foregoing, if the original of any  
5        document or material submitted to the allocator or  
6        placed in the document repository was, in the hands  
7        of the party which provided it, otherwise discover-  
8        able or admissible, then such original document, if  
9        subsequently sought from such party, shall remain  
10       so. If a fact generated or obtained during the alloca-  
11       tion was, in the hands of a witness, otherwise discov-  
12       erable or admissible, then such fact, if subsequently  
13       sought from such other party, shall remain so.

14           “(4) NO WAIVER OF PRIVILEGE.—The submis-  
15       sion of, documents, or information pursuant to the  
16       allocation process shall not be deemed to be a waiver  
17       of any privilege, applicable to such documents or in-  
18       formation under any Federal or State law or rule of  
19       discovery or evidence.

20           “(5) PROCEDURE WHEN DISCOVERY IS  
21       SOUGHT.—Any person, including the United States  
22       and any Federal, State or local agency, department  
23       or instrumentality, receiving any request for a state-  
24       ment, document, or material submitted, or for the  
25       record of any allocation proceeding, shall promptly

1        notify the person who originally submitted such item  
2        and shall provide such submitting person the oppor-  
3        tunity to assert and defend the confidentiality of  
4        such item. No person shall release or provide a copy  
5        of the item to any person not a party to such alloca-  
6        tion, except as may be required by court order.

7            “(6) CIVIL PENALTY FOR VIOLATION OF CON-  
8        FIDENTIALITY.—Any person who fails to maintain  
9        the confidentiality of any statements, documents or  
10       information generated or obtained during an alloca-  
11       tion proceeding, or who releases any such informa-  
12       tion in violation of this section shall be subject to  
13       civil penalties of up to \$25,000 per violation. Such  
14       penalties may be sought in a civil action initiated by  
15       the Attorney General on behalf of the United States,  
16       or any allocation party adversely affected by the fail-  
17       ure to maintain confidentiality.

18          “(l) REJECTION OF ALLOCATOR’S REPORT.—The  
19       Administrator and the Attorney General of the United  
20       States may reject the allocator’s report if they jointly de-  
21       termine that—

22            “(1) no rational interpretation of the facts be-  
23       fore the allocator, in light of the factors required to  
24       be considered, would form a reasonable basis for the  
25       shares assigned to the parties;

1           “(2) the allocation was affected by bias, fraud,  
2           or unlawful conduct; or

3           “(3) the allocation was substantially and di-  
4           rectly affected by procedural error.

5 The allocator’s report may not be rejected after the United  
6 States has accepted a settlement offer (excluding de  
7 minimis or other expedited settlements) based on the allo-  
8 cation. The Administrator and the Attorney General shall  
9 seek to make any such determination within 180 days  
10 after the receipt of the first offer based on the allocator’s  
11 report. The determinations of the Administrator and the  
12 Attorney General under this subsection shall not be judi-  
13 cially reviewable. No such determination may be delegated  
14 to any officer or employee of the Environmental Protection  
15 Agency or the Department of Justice below the level of  
16 an Assistant Secretary or Acting Assistant Secretary with  
17 authority for implementing this Act at the Environmental  
18 Protection Agency or the Department of Justice.

19       “(m) SECOND ALLOCATION.—If the United States  
20 rejects an allocator’s report, the parties shall select a new  
21 allocator pursuant to subsection (e) to perform, on an ex-  
22 pedited basis, a new allocation based on the same record  
23 available to the first allocator. The moratorium on com-  
24 mencement of litigation and tolling of statutes of limita-  
25 tion set forth in subsection (b) shall be extended until 90

1 days after the issuance of the second allocation report. If  
2 the United States rejects the second allocation the Presi-  
3 dent may, following the expiration of the moratorium on  
4 commencement of litigation, commence an action under  
5 section 107.

6 “(n) NEW INFORMATION.—Any settling party, in-  
7 cluding the United States, may seek a new allocation pur-  
8 suant to subsection (h), where that party presents clear  
9 and convincing information or the United States otherwise  
10 determines on the basis of clear and convincing informa-  
11 tion that—

12 “(1) the allocator did not have information con-  
13 cerning 35 percent or more of the materials contain-  
14 ing hazardous substances at the facility, and that  
15 this information has been discovered subsequent to  
16 the issuance of the allocator’s report; or

17 “(2) the allocator did not have information con-  
18 cerning a person not subject to the allocation who  
19 contributed 15 percent or more of materials contain-  
20 ing hazardous substances at the facility, and that  
21 this information has been discovered subsequent to  
22 the issuance of the allocator’s report.

23 Determinations by the United States pursuant to this sub-  
24 section shall not be subject to judicial review.

25 “(o) SETTLEMENT FOLLOWING ALLOCATION.—

1           “(1) OBLIGATIONS OF THE UNITED STATES.—

2           If, within 90 days after issuance of the allocator’s re-  
3           port, an allocation party (A) makes a written offer  
4           to settle with respect to the response action based on  
5           the percentage share specified by the allocator and  
6           on the additional terms and conditions of settlement  
7           (other than the percentage share of liability) that  
8           are acceptable to the President, and (B) is not in de-  
9           fault on any information requests under this Act,  
10          then the President shall not seek a higher percent-  
11          age share of response costs other than the premia  
12          authorized by this section, unless the President has  
13          rejected the offer on a basis other than the percent-  
14          age share of liability, or unless the Administrator  
15          and the Attorney General have rejected the alloca-  
16          tion report pursuant to subsection (l).

17          “(2) EXPLANATION OF REFUSAL TO SETTLE.—

18          If the Administrator and the Attorney General de-  
19          termine not to settle on the basis of the allocation,  
20          they shall provide the allocation parties and mem-  
21          bers of the affected community with a written expla-  
22          nation of the Administrator’s determination.

23          “(3) SETTLEMENT PROVISIONS.—Settlements  
24          based on allocated shares shall include each of the  
25          following:

1           “(A) A waiver of contribution rights  
2           against all parties who are potentially respon-  
3           sible parties for the response action, as well as  
4           a waiver of any rights to challenge any settle-  
5           ment the President enters into with any other  
6           potentially responsible party.

7           “(B) Covenants not to sue, consistent with  
8           section 122(f), and provisions regarding per-  
9           formance or adequate assurance of performance  
10          of response actions addressed in the settlement.

11          “(C) A premium determined on a site spe-  
12          cific basis and subject to the limitations set  
13          forth in paragraph (4), that compensates for  
14          the United States litigation risk with respect to  
15          potentially responsible parties who have not re-  
16          solved their liability to the United States, ex-  
17          cept that no such premium shall apply if all  
18          parties settle or the settlement covers 100 per-  
19          cent of response costs.

20          “(D) Contribution protection, consistent  
21          with section 113(f), regarding matters ad-  
22          dressed in the settlement. Such settlement does  
23          not discharge any of the other potentially re-  
24          sponsible parties unless its terms so provide,

1 but it reduces the potential liability of the oth-  
2 ers by the amount of the settlement.

3 “(E) Provisions through which the settling  
4 parties shall receive reimbursement from the  
5 Fund for any response costs incurred by such  
6 parties in excess of the aggregate of their allo-  
7 cated share and any premia required by the set-  
8 tlement. Such right to reimbursement shall not  
9 be contingent on the United States recovery of  
10 response costs from any responsible person not  
11 a party to any settlement with the United  
12 States.

13 “(4) The premia authorized by paragraph  
14 (3)(C) for litigation risk shall not exceed the follow-  
15 ing:

16 “(A) Five percent of the total costs as-  
17 sumed by a settling party, where settlements  
18 (and any orphan share identified by the allo-  
19 cator) account for 80 percent or more of re-  
20 sponsibility at the facility.

21 “(B) Ten percent of the total costs as-  
22 sumed by a settling party, where settlements  
23 (and any orphan share identified by the allo-  
24 cator) account for more than 60 percent and

1 less than 80 percent of responsibility at the  
2 facility.

3 “(C) Fifteen percent of the total costs as-  
4 sumed by a settling party, where settlements  
5 (and any orphan share identified by the allo-  
6 cator) account for more than 40 percent and  
7 less than 60 percent of responsibility at the  
8 facility.

9 “(D) Twenty percent of the total costs as-  
10 sumed by a settling party, where settlements  
11 (and any orphan share identified by the allo-  
12 cator) account for 40 percent or less of respon-  
13 sibility at the facility.

14 The Administrator shall have authority to promul-  
15 gate regulations to modify the premia percentages  
16 established in this subsection. The Administrator  
17 may not propose a rule before the date 36 months  
18 after the enactment of this section, and no such rule  
19 may take effect before the date 48 months after the  
20 enactment of this section. Such rule must be based  
21 upon an administrative record establishing that such  
22 modification is necessary to reflect actual experience  
23 regarding the litigation risk faced by the United  
24 States in proceeding against nonsettling parties  
25 under this section.

1           “(5) AUTHORIZATION OF REIMBURSEMENT.—

2           In any settlement in which a party agrees to per-  
3           form response work in excess of its share, the Ad-  
4           ministrator shall have authority to carry out his  
5           duty to reimburse settling parties under this section  
6           pursuant to such reasonable procedures as the Ad-  
7           ministrator may prescribe.

8           “(6) FINANCIAL CONTROLS ON REIMBURSE-  
9           MENT.—The Administrator shall require all claims  
10          for reimbursement to be supported by—

11                 “(A) documentation of actual costs in-  
12                 curred; and

13                 “(B) sufficient information to enable the  
14                 Administrator to determine whether such costs  
15                 were reasonable.

16          The Administrator may require independent auditing  
17          of any claim for reimbursement.

18          “(p) POST-SETTLEMENT LITIGATION.—

19                 “(1) IN GENERAL.—The United States may  
20                 commence an action under section 107 against any  
21                 person liable under that section who has not resolved  
22                 its liability to the United States following allocation,  
23                 on or after 90 days following issuance of the  
24                 allocator’s report. In any such action, such person  
25                 shall be liable in accordance with section 107 for all

1 response costs not recovered through settlements  
2 with other persons. Such recoverable costs shall in-  
3 clude any federally funded orphan share identified in  
4 accordance with subsection (h), but shall not include  
5 any shares allocated to Federal, State, or local gov-  
6 ernmental agencies, departments, or instrumental-  
7 ities. Defendants in any such action may implead  
8 only allocation parties who did not resolve their li-  
9 ability to the United States. The Administrator and  
10 the Attorney General shall issue guidelines to ensure  
11 that the relief sought against de minimis parties  
12 under principles of joint and several liability will not  
13 be grossly disproportionate to their contribution to  
14 the facility. The application of such guidelines is  
15 committed to the discretion of the Administrator  
16 and the Attorney General.

17 “(2) CERTIFICATION.—In commencing any ac-  
18 tion under section 107 following allocation, the At-  
19 torney General must certify, in the complaint, that  
20 the United States has been unable to reach a settle-  
21 ment that would be in the best interests of the Unit-  
22 ed States. This certification shall not be subject to  
23 judicial review.

24 “(3) DEFENDANTS.—No person may commence  
25 an action under section 107 or otherwise seek con-

1       tribution against any person who was not identified  
2       as an allocation party pursuant to subsection (c) or  
3       subsequently identified as a potentially liable party  
4       under subsection (n) (relating to new information).

5       “(4) ADMISSIBILITY OF ALLOCATOR’S RE-  
6       PORT.—The allocator’s report shall not be admissi-  
7       ble in any court for any purpose, except as set forth  
8       in this section. The allocator’s report, subject to the  
9       rules and discretion of the court, may be admissible  
10      solely for the purpose of assisting the court in mak-  
11      ing an equitable allocation of response costs among  
12      the relative shares of nonsettling liable parties.

13      “(5) COSTS OF ALLOCATION PROCEDURE ON  
14      ORPHAN SHARE.—

15           “(A) INCLUDED AS COSTS OF RE-  
16           SPONSE.—The costs of implementing the alloca-  
17           tion procedure set forth in this section, includ-  
18           ing reasonable fees and expenses of the allo-  
19           cator, shall be considered necessary costs of re-  
20           sponse for purposes of this Act.

21           “(B) ORPHAN SHARE.—The costs attrib-  
22           utable to any funding of orphan shares identi-  
23           fied by the allocator pursuant to subsection  
24           (e)(4) also shall be considered necessary costs  
25           of response for purposes of this Act, and shall

1           be recoverable from liable parties who do not  
2           resolve their liability on the basis of the alloca-  
3           tion.

4           “(6) REJECTION OF SHARE DETERMINATION.—

5           In any action by the United States under this title,  
6           if the United States has rejected an offer of settle-  
7           ment that is consistent with subsection (o) and that  
8           was presented to the United States prior to the com-  
9           mencement of the action, the offeror shall be entitled  
10          to recover from the United States the offeror’s rea-  
11          sonable costs of defending the action after the mak-  
12          ing of the offer (including reasonable attorneys’ fees)  
13          if the ultimate resolution of liability or allocation of  
14          costs with respect to the offeror (taking into account  
15          all settlements and reimbursements with respect to  
16          the facility other than those attributable to insur-  
17          ance or indemnification), is as, or more, favorable to  
18          the offeror than the offer based on the allocation.

19          “(q) REIMBURSEMENT FOR UAO PERFORMANCE.—

20          “(1) REIMBURSEMENT.—Parties who satisfac-  
21          torily perform work under an administrative order  
22          issued under section 106(a) with respect to a reme-  
23          dial action for which an allocation is required by  
24          subsection (a)(1), shall be entitled to reimbursement  
25          for the reasonable and necessary costs of work they

1 perform in excess of the share assigned to them in  
2 the allocation in accordance with the provisions of  
3 this section, provided that the allocation report is  
4 not rejected by the United States and, that, at the  
5 end of the moratorium following the allocation, the  
6 performing party, in consideration of such reim-  
7 bursement—

8 “(A) agrees not to contest liability for all  
9 response costs not inconsistent with the Na-  
10 tional Contingency Plan to the extent of the al-  
11 located share;

12 “(B) receives no covenant not to sue;

13 “(C) agrees that its reimbursement shall  
14 be reduced by an amount equal to the maxi-  
15 mum litigation risk premium provided for in  
16 subsection (o)(4) based on the total allocated  
17 shares of the allocation parties who have not  
18 reached settlements with the United States by  
19 the end of the moratorium on commencement of  
20 actions provided in subsection (b);

21 “(D) waives contribution rights against all  
22 parties who are potentially responsible parties  
23 for the response action, as well as waives any  
24 rights to challenge any settlement the President

1 enters into with any other potentially respon-  
2 sible party.

3 “(2) OFFSET.—Any and all reimbursement pro-  
4 vided to a performing party for work in excess of its  
5 share is subject to equitable offset or reduction by  
6 the Administrator upon a finding of a failure to per-  
7 form any aspect of the remedy in a proper and time-  
8 ly manner.

9 “(3) TIME OF PAYMENT.—Any and all reim-  
10 bursement to a performing party for work in excess  
11 of its share shall be paid after work is completed,  
12 but no sooner than completion of the construction of  
13 the remedial action.

14 “(4) LIMIT ON ORPHAN SHARE FUNDING.—The  
15 amount of orphan share funding available to the  
16 performing party shall be further limited as follows:

17 “(A) Performing parties who fully waive  
18 their right to challenge remedy selection at the  
19 end of the moratorium following allocation shall  
20 be entitled to full reimbursement of costs in ex-  
21 cess of the party’s share and attributable by the  
22 allocator to the orphan share paid in nominal  
23 dollars after the work is completed, but no  
24 sooner than completion of the construction of  
25 the remedial action.

1           “(B) Performing parties who retain their  
2           right to challenge the remedy shall be reim-  
3           bursed for 90 percent of orphan share funding,  
4           paid in nominal dollars after the work is com-  
5           pleted, but no sooner than completion of the  
6           construction of the remedial action, unless the  
7           orphan share is less than 20 percent of respon-  
8           sibility at the site, in which case such parties  
9           shall be reimbursed only 80 percent of the or-  
10          phan share.

11       For purposes of this subsection ‘nominal dollar’  
12       means actual dollars spent by the performing party,  
13       without increase for interest or inflation.

14           “(5) INTEREST.—Reimbursement for work in  
15       excess of the performing party’s allocated share but  
16       that is not attributable to the orphan share shall be  
17       paid in nominal dollars after work is completed, but  
18       no sooner than completion of the construction of the  
19       remedial action, provided that the performing party  
20       is entitled to all interest (prejudgment and post  
21       judgment, whether recovered from a party or earned  
22       in a site account) that has accrued on money recov-  
23       ered by the United States from other parties for  
24       such work at the time construction of the remedy is  
25       completed.

1           “(6) FINANCIAL CONTROLS ON REIMBURSE-  
2           MENT.—The Administrator shall require that all  
3           claims for reimbursement be supported by—

4                   “(A) documentation of actual costs in-  
5                   curred; and

6                   “(B) sufficient information to enable the  
7           Environmental Protection Agency to determine  
8           whether such costs were reasonable.

9           The Administrator may require independent auditing  
10          of any claim for reimbursement.

11          “(r) FUNDING OF ORPHAN SHARES.—From funds  
12          available in the Fund in any given fiscal year, and without  
13          further appropriation action, the President shall make re-  
14          imbursements from the Fund, to eligible parties for costs  
15          incurred and equitably attributable to orphan shares de-  
16          termined pursuant to this section, provided that Fund fi-  
17          nancing of orphan shares shall not exceed \$300,000,000  
18          in any fiscal year. Reimbursements made under this sub-  
19          section shall be subject to such terms and conditions as  
20          the President may prescribe.

21          “(s) PROCEDURES.—The Administrator, after con-  
22          sultation with the Attorney General, may promulgate rules  
23          (or guidance) of Agency organization, procedure, and  
24          practices but shall not have additional authority, except  
25          as specifically set forth in this section, to promulgate rules

1 or publish guidance to restrict the allocator’s discretion  
2 in the conduct of the allocation.

3 “(t) ROLE OF FEDERAL AGENCIES.—Federal depart-  
4 ments, agencies, or instrumentalities that are identified as  
5 potentially responsible parties shall be subject to, and be  
6 entitled to the benefits of, the allocation process provided  
7 by this section to the same extent as any other party.

8 “(u) REPRESENTATION OF THE UNITED STATES.—  
9 The Administrator and the Attorney General shall be enti-  
10 tled to review all documents and participate in any phase  
11 of the allocation proceeding.

12 “(v) ANNUAL REPORT.—The President shall report  
13 annually to Congress on the administration of the alloca-  
14 tion scheme under this section, and provide information  
15 comparing allocation results with actual settlements at  
16 multiparty facilities.

17 “(w) SAVINGS PROVISIONS.—Nothing in this section  
18 shall in any way limit or affect the President’s authority  
19 to exercise the powers conferred by section 103, 104, 105,  
20 106, or 122 of this title, or to commence an action against  
21 a party where there is a contemporaneous filing of a judi-  
22 cial consent decree resolving that party’s liability; or to  
23 file a proof of claim or take other action in a proceeding  
24 under title 11 of the United States Code. The procedures  
25 established in this section shall not be construed to modify

1 or affect in any way the principles of retroactive, strict,  
2 joint and several liability under this title. Nothing in this  
3 section shall limit or affect—

4 “(1) the Administrator’s obligation to perform  
5 an allocation for facilities that have been the subject  
6 of partial or expedited settlements;

7 “(2) the ability of a potentially responsible  
8 party at a facility to resolve its liability to the Unit-  
9 ed States or other parties at any time before initi-  
10 ation or completion of the allocation process;

11 “(3) the validity, enforceability, finality, or mer-  
12 its of any judicial or administrative order, judgment,  
13 or decree that is issued, signed, lodged, or entered  
14 with respect to liability under this Act or that au-  
15 thorizes modification of any such order, judgment or  
16 decree; or

17 “(4) the validity, enforceability, finality or mer-  
18 its of any preexisting contract or agreement relating  
19 to any allocation of responsibility or any sharing of  
20 response costs under this Act.”.

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